No. 87-107



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

BRENDA PATTERSON,

*Petitioner*,

—v.—

McCLEAN CREDIT UNION,

*Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER SUBMITTED BY THE CENTER FOR CONSTITUTIONAL RIGHTS, THE CENTER FOR LAW & SOCIAL JUSTICE, THE NATIONAL CONFERENCE OF BLACK LAWYERS, THE NATIONAL LAWYERS GUILD, TOWARD A MORE PERFECT UNION, THE NATIONAL RAINBOW COALITION, AND OTHER ORGANIZATIONS

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## CONSENT OF THE PARTIES

Amici Curiae file this brief with the consent of both parties in support of the position advanced by the Petitioner. Letters of consent have been filed with the Clerk of this Court.

## INTEREST OF AMICI CURIAE

The thirty-nine organizations, groups, and individuals joining in this brief amici curiae (see appendix) represent many segments of American society with diverse interests. They share a mutual concern that the Court will use the instant case to reaffirm its and this nation's commitment to rid our society of the haunting spectres of racial discrimination and hatred.

## PRELIMINARY STATEMENT

On April 25, 1988, this Court restored to the calendar for rearguent the case of Patterson v. McClean Credit Union, No. 87-107. The Court asked that the parties consider and brief the following question:

> "Whether or not the interpretation of 42 U.S.C. § 1981 adopted . . . in Runyon v. McCrary, 427 U.S. 160 (1976), should be reconsidered."

As originally briefed and argued,

Patterson involved the sole legal question whether § 1981 encompassed a claim of racial discrimination in the terms and conditions of employment, including a claim that the petitioner was harassed because of her race. The holding of this Court in Runyon -- that § 1981 "reaches private conduct," 427 U.S. at 173 -- undergirds the claim asserted in Patterson and is essential to the protection of the freedoms conferred by the thirteenth amendment and by Congress through the Civil Rights Act of 1866. A decision to overrule that holding would constitute a grave step backward in the struggle for racial equality and would disrupt the stability of cherished rights long secured.

INTRODUCTION AND SUMMARY OF ARGUMENT

From the original ratification of the United States Constitution in 1787, to the



enactment of the thirteenth amendment in 1865, the "peculiar institution" of American slavery has remained undefined by the document that initially endorsed, or at least tolerated its existence, and that eventually eradicated it. Throughout history, the inability and, perhaps, unwillingness of those entrusted with the interpretation of the legal pronouncements abolishing that institution to honestly assess both the nature of American slavery and the meaning of its abolition have unnecessarily and unjustly retarded the growth of those fundamental freedoms essential to a civilized society.[1]

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[1] See Kinoy, The Constitutional Right of Negro Freedom, 21 Rutgers L. Rev. 387 (1967); cf. A. L. Higginbotham, In the Matter of Color 6-7 (1st ed. 1978) ("[F]or black Americans today . . . the early failure of the nation's founders and their constitutional heirs to share the legacy of freedom with black Americans is at least one factor in America's perpetual racial

Moreover, the mechanical interpretations in the post-Reconstruction era[2] of the Civil War Amendments operated to undermine the concepts of dignity and justice that have been lauded as the true embodiment of the Constitution.

What follows is amici's attempt to persuade the Court not to recreate the obstacles that resulted in the virtual burial in the post-Reconstruction era of the Civil War Amendments and legislation enacted pursuant thereto. The central thrust of our argument is that the

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tensions."); Kinoy, Jones v. Alfred H. Mayer Co.: An Historic Step Forward, 22 Vand. L. Rev. 475, 476-77 (1969) (same).

[2] As noted historian, Eric Foner, recently explained, "Reconstruction was not merely a specific time period, but the beginning of an extended historical process: the adjustment of American society to the end of slavery." E. Foner, Reconstruction: America's Unfinished Revolution, 1863-1877, at xxvii (1988).



thirteenth amendment unequivocally authorizes Congressional regulation of private discriminatory conduct. Such is evidenced by the legislative debates on the Amendment and, more recently, by this Court's seminal decision in Jones v. Alfred H. Mayer Co.[3] Moreover, those debates, the reality of slavery and the national commitment to eradicate its vestiges, all indicate that the ground upon which members of this Court have based reconsideration of Runyon -- "the difficulties posed by petitioner's argument for a fundamental extension of liability under 42 U.S.C. § 1981"[4] -- is infirm. Finally, lest we return to the post-Reconstruction Plessy v.

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[3] 392 U.S. 409 (1968).

[4] Patterson v. McClean Credit Union, No. 87-107, slip op. at 1 (U.S. April 25, 1988) (per curiam) (emphasis added).

Patterson[5] and Civil Rights Cases of 1883[6] era, amici urge this Court to reaffirm § 1981's reach to private discrimination and to find that racial discrimination in the terms and conditions of employment, including racial harassment, states a cognizable claim under § 1981.

## ARGUMENT

### I. THE THIRTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION PROSCRIBES PRIVATE DISCRIMINATION.

#### A. The Legislative History of the Thirteenth Amendment Confirms Congress's Overarching Intent to Eradicate Slavery and Its Incidents

The thirteenth amendment[7] to the United

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[5] 163 U.S. 537 (1896).

[6] 109 U.S. 3 (1883).

[7] Section one of the Thirteenth Amendment provides that "[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place



States Constitution, abolishing slavery and securing universal freedom, was enacted in 1865 amid sectional strife and socio-political controversy.[8] The issuance of the Emancipation Proclamation three years prior was deemed by many an inadequate measure to secure the freedom of the Black race.[9] The geographical and political

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subject to their jurisdiction." U.S. Const., Amendment 13, § 1 (1865). Section two confers upon Congress the "power to enforce this article by appropriate legislation." Id. at § 2.

[8] Debates around the Thirteenth Amendment commenced in the spring of 1864 just prior to the official end of the Civil War.

[9] See, e.g., Cong. Globe 38th Cong., 1st Sess. 1314 (1864) (Remarks of Senator Trumbull [R., Ill.]) (". . . any and all these laws and proclamations, giving to each the largest effect claimed by its friends, are ineffectual to the destruction of slavery"); id. at 1324 (Remarks of Senator Wilson [R., Mass.]) (noting that notwithstanding the Emancipation Proclamation, the thirteenth amendment was necessary to "make impossible forevermore the reappearing of the discarded slave

limitations of President Lincoln's manumission fell far short of the needed destruction of the entire system of chattel slavery. Recognizing that "none of the acts hostile to slavery . . . [at the time of the debates] ha[d] gone beyond the fact of making men affected by them free; that no one of them . . . reached the root of slavery and prepared for the destruction of the system,"[10] Representative Wilson, on the floor of the House of Representatives, implored his colleagues to "assert the ultimate triumph of liberty over slavery,

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system, and the returning of the despotism of the slavemasters' domination."). See also Buchanan, The Quest For Freedom: A Legal History of the Thirteenth Amendment, 12 Hous. L. Rev. 1, 7 (1974).

Indeed, well before 1863 it was generally conceded, even by proslavery forces, that "the disintegration of slavery had begun." E. Foner, supra note 2, at 3, 8.

10 Cong. Globe, 38th Cong., 1st Sess. 1203 (1864).



democracy over aristocracy, free government over absolutism,"[11] by passing the thirteenth amendment.

The concern for the plight of all Blacks -- whether slaves in the South or free in the North -- was paramount to antislavery forces within the Congress. The horrors of the "hapless bondsman"[12] were universally known. Abolitionist Congressmen also knew, however, that the freedman of the North "was only less degraded, spurned, and restricted than his enslaved fellow. He bore all the burdens, badges and indicia of slavery save only the technical one."[13] Thus, according to its

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11 Id. at 1204.

12 Id. at 1324.

13 tenBroek, Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment, 39 Calif. L. Rev. 171, 179 (1951). For a discussion of the

strongest proponents, the thirteenth amendment was necessary to ensure enduring, universal freedom and to create a fundamental, national right to liberty, equality, and dignity for all.

Congress did not confine its vision of universal freedom to members of the Black race; it was to extend to all of humanity within the jurisdiction of the United

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status of Blacks in the antebellum North, see J. Franklin, From Slavery to Freedom 151-64 (1965). In addition to the concern for the liberties of the freedman, the relationship of the federal government to the states was a major theme discussed during the debates. See id. at 174-77. Opponents to the thirteenth amendment argued that the sovereignty of the states was sacrosanct and that the Amendment proposed "a revolutionary change in the Government" that "essentially repudiate[d] the principle upon which the Union was formed." Cong. Globe, 38th Cong., 1st Sess. 2986 (1864) (Remarks of Representative Kelley [R., Pa]).



States.[14] In an effort to define this new humanity for future generations, Congress turned to the inhumanity perpetrated against the slaves for over two hundred years and pledged that never again would any group or individual be subject to such inhumane treatment within the jurisdiction of the Constitution.

Central to the concept of freedom envisoned by antislavery members of the 38th Congress was the "obliterat[ion of] the last lingering vestiges of the slave system." (Remarks of Representative Wilson,

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[14] See Kinoy, supra note 1, 21 Rutgers L. Rev. at 389-90. See also The Civil Rights Cases of 1883, 109 U.S. at 37 (Harlan, J., dissenting) ("The terms of the thirteenth amendment are absolute and universal. They embrace every race which then was, or might thereafter be, within the United States."); Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 72 (1873) ("Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter.").

[R., Ill.]). In turn, at the heart of the obliteration of the vestiges of slavery was, at a minimum, the total renunciation of the notorious opinion of Chief Justice Roger Taney in Dred Scott v. Sandford[15] in which Taney declared:

> at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted . . . [the black race were] regarded as beings of an inferior order; and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, thay they had no rights which the white man was bound to respect.[16]

The goal of Congress to overrule Dred

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15 60 U.S. (19 How.) 393 (1856). For reference to the attempt of rebel states to "promulgate the Dred Scott decision," see, Cong. Globe, 38th Cong., 1st Sess. 1324 (1864) (Remarks of Senator Wilson [R., Ill.]). Senator Wilson challenged "anti-slavery men of united America . . . [to] seize the first, the last, and every occasion to trample down and stamp out every vestige of slavery." Id. at 1324.

16 60 U.S. at 407.



Scott with the enactment of the thirteenth amendment is manifested both by specific reference to the decision and by forceful expressions to restore the authority and integrity of the Constitution.[17] Senator Trumbull and Representative Wilson charitably described the framers of the Constitution as men of good will who uniformly deplored the horrors of slavery.[18]

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17 See also Civil Rights Cases of 1883, 109 U.S. at 37 (Harlan, J., dissenting) (noting that the Civil Rights Act of 1866, enacted pursuant to the thirteenth amendment and prior to the adoption of the fourteenth, conferred national citizenship upon the Black race); United States v. Cruikshank, 25 F.Cas. 707, 711 (No. 14,897) (C.C.D. La. 1874) (discussing the necessity of the legislative reversal of Dred Scott decision) (Bradley, J.), aff'd, 92 U.S. 542 (1875).

18 Representative Wilson maintained that the framers "believed in the incompatibility of slavery with a free Government; but they regarded the latter to be the stronger, not yet having had the experience with slavery as a political power." Cong. Globe, 38th Cong., 1st Sess.

Under this view, the framers "looked forward to the not distant, nor as they supposed uncertain period when slavery should be abolished, and the Government become in fact, what they made it in name, one securing the blessings of liberty to all."[19] Restoration of the mandates of the

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1200 (1864). Similarly, Senator Trumbull declared:

> Our fathers who made the Constitution regarded [slavery] . . . as an evil, and looked forward to its early extinction. They felt the inconsistency of their position, while proclaiming the equal rights of all to life, liberty, and happiness, they denied liberty, happiness, and life itself to a whole race, except in subordination to them.

Id. at 1313.

19 Cong. Globe, 38th Cong., 1st Sess. 1313 (1864) (Remarks of Senator Trumbull [R., Ill.]) (emphasis added).



Constitution could be achieved only by extending its protections and guarantees as originally conceived to the Black race.[20]

Thus, the thirteenth amendment was intended to effect not only the immediate emancipation of the slaves, but the liberation of the nation. The passage of the Amendment conferred upon Congress a "constitutional mandate to enforce . . . not just the liberty of blacks but the liberty of the whites as well and included not just freedom from personal bondage but

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20 As expressed by Senator Charles Sumner:

> It is only necessary to carry the Republic back to its baptismal vows, and the declared sentiments of its origin. There is the Declaration of Independence: let its solemn promises be redeemed. There is the Constitution: let it speak, according to the promises of the Declaration.

Cong. Globe, 38th Cong., 1st Sess. 1482 (1864).

protection in a wide range of natural and constitutional rights."[21]

That the intent of the thirteenth amendment was to reach private conduct cannot be denied. As poignantly stated by Representative Wilson:

> Slavery is defined to be "the state of entire subjugation of one person to the will of another." This is despotism, pure and simple. It is true that this definition concerns more the relations existing between master and slave than it does those between the system of slavery and the government. But we need not hope to find a system purely despotic acting in harmony with a Government wholly, or even partially, republican. An antagonism exists between the two which can never be reconciled.[22]

To be certain, support for broad legislative authority to effectuate the

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[21] tenBroek, supra note 12, at 183.

[22] Cong. Globe, 38th Cong., 1st Sess. 1200 (1864) (Remarks of Rep. Wilson [R., Iowa]) (emphasis added).



mandate of universal freedom was not unanimous.[23] The 38th Congress, however, well aware of the various interpretations urged by opponents and proponents alike, nonetheless enacted the thirteenth amendment. Neither subsequent doubts, ambivalence, nor actual regret by a handful of Congressmen with respect to the potential breadth of the thirteenth amendment as enacted operates to eviscerate the freedoms embodied therein at its inception.

B. The Precedents of This Court Soundly Establish the Reach of the Thirteenth Amendment to Private Discriminatory Conduct

As early as 1873,[24] judicial

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[23] Nor has any legislative measure, amici will venture to assert, ever garnered either the unanimous consent or understanding of its terms and effects from both Houses of Congress.

[24] The first judicial encounters with the thirteenth amendment after its ratification in 1865 were generally by

interpretations of the thirteenth amendment in this Court reaffirmed the sentiment of the Reconstruction Congress by recognizing the amendment as a "grand yet simple declaration of personal freedom of all the human race within the jurisdiction of this government . . . ." [25] Ten years later, in the Civil Rights Cases of 1883, this Court noted that the scope of the thirteenth amendment was not restricted to the mere emancipation of the slaves. "By its own unaided force and effect it abolished

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Supreme Court justices on circuit duty in the lower federal courts. At least one commentator has concluded that "most of the circuit decisions by Supreme Court justices gave expansive readings to the thirteenth amendment . . . ." Buchanan, supra note 9, 12 Hous. L. Rev. at 358. Although none of those decisions were ever adopted by a majority of the Court, see id., they provide some indication of a broader view of the amendment shortly after its ratification.

25 Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 69 (1872).



slavery, and established universal freedom." [26] Under the thirteenth amendment, Congress was authorized to pass legislation "so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude . . . [: legislation that could] be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not." [27]

Thus, although the power of Congress to enact legislation to enforce the thirteenth amendment was clear, the historic debate in the Civil Rights Cases of 1883 concerned the scope of that power in terms of defining the badges and incidents of slavery. While Justice Bradley, for the majority, expressed a restrictive view of

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26 109 U.S. at 20.

27 Id. (emphasis added).

Congress's power, the first Justice Harlan, in dissent, urged a more expansive reading:

> [S]ince slavery, as the court has repeatedly declared was the moving or principal cause of the adoption of [the thirteenth] amendment and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from: and protection against, all discrimination against them because of their race: in respect of such civil rights as belong to freemen of other races.[28]

Against this background, Justice Harlan concluded that discrimination against Blacks solely on account of race imposed a badge of servitude in conflict with the universal freedom guaranteed by the thirteenth amendment.[29]

After the decision in the Civil Rights

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[28] 109 U.S. at 40 (Harlan, J., dissenting).

[29] Id.



Cases of 1883[30], the thirteenth amendment was, in effect, abandoned as a constitutional mandate.[31] Eighty-five

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[30] Although the Court in the Civil Rights Cases unanimously recognized the power of Congress to define and legislate against badges and incidents of slavery, see 109 U.S. at 35 (Harlan, J., dissenting), a majority rejected Congress's attempt to exercise its power through legislation proscribing racial discrimination in public accomodations and amusements. Thus, while the Court adopted a broad theoretical view of Congressional power under the amendment, it in fact undermined that power by narrowly interpreting "badges and incidents of slavery" to exclude racial discrimination and segregation. Id. at 22-24.

[31] For a collection of cases in which the Thirteenth Amendment was narrowly construed, if applied at all, see Buchanan, SUPRA note 9, 12 Hous. L. Rev. at 593-97.

The pinnacle of judicial repression of the Thirteenth Amendment and the attendant emasculation of the freedoms secured thereby came in the 1896 decision in Plessy v. Ferguson, 163 U.S. 537 (1896). Finding the inapplicability of the Thirteenth Amendment to segregation legislation "too clear for argument," the Plessy Court observed that while "[s]lavery implies involuntary servitude, -- a state of bondage[,] . . . [a] statute [requiring

years later, the first Justice Harlan's dissenting opinion in the Civil Rights Cases of 1883 was reasserted in force in this Court's opinion in Jones v. Alfred H. Mayer Co., supra. In Jones this Court resurrected the thirteenth amendment and reaffirmed Congressional power to enact legislation to enforce its goals. At issue in Jones was the refusal by private individuals to sell a home to the Joneses solely because they were Black. Writing for the Court,[32] Justice Stewart found that the language of the statute "[o]n its face" prohibited all racial discrimination in the sale or rental of property.[33] Examining

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separate but equal accomodations] has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude." Id. at 542.

[32] Only two justices dissented from the decision in Jones.

[33] 392 U.S at 421.



the origins of 42 U.S.C. § 1982, which also grew out of the Civil Rights Act of 1866, the Court next conducted an exhaustive review of the legislative history and found clear confirmation of its reading of the statute.[34] Rejecting the argument that Congress sought only to eliminate discriminatory laws, Justice Stewart concluded that Congress plainly intended "to secure . . . [the] right[s protected by § 1982] against interference from any source whatever, whether governmental or private."[35] Looking then to the constitutional authority for such legislation the Court held that "Congress has the power under the thirteenth amendment rationally to determine what are the badges and the incidents of slavery,

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[34] Id. at 422-37.

[35] Id. at 424.

and the authority to translate that determination into effective legislation."[36]

The Jones Court's conclusions, both statutory and constitutional, were undoubtedly prudent, fair and right.[37]

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[36] Id. at 440.

[37] The Civil Rights Cases of 1883 unanimously and unambiguously established the authority of Congress under the thirteenth amendment to enact direct and primary legislation reaching the discriminatory conduct of private actors. See 109 U.S. at 30, 39. The Jones Court properly concluded that § 1982 was an appropriate exercise of that authority to eradicate the badges and incidents of slavery.

The magnitude of the Jones Court's resurrection of the thirteenth amendment cannot be diminished. One commentator has accurately described Jones as "[r]ivaling Brown [v. Board of Educ., 347 U.S. 483 (1954)] in historical import . . . ." Note, Jones v. Mayer: The Thirteenth Amendment and the Federal Anti-Discrimination Laws, 69 Colum. L. Rev. 1019 (1969). See generally Kinoy, The Constitutional Right of Negro Freedom Revisited: Some First Thoughts on Jones v. Alfred H. Mayer Company, 22 Rutgers L. Rev. 537, 539-43 (1968).



The dissent's recital of contrary legislative intent[38] suggests, at best, spirited debate around an important piece of legislation. Indeed, the second Justice Harlan's assertion that a reading of the legislative history of the Civil Rights Act of 1866 demonstrates that "a contrary conclusion may equally well be drawn,"[39] is hardly a riveting indictment of the Court's reasoning. Even if one assumes that Congress's intent was hopelessly ambiguous, it does not follow that the Court's interpretation of § 1982 is either unsupported or insupportable.

The Jones Court legitimately construed

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[38] The central thrust of the Jones dissent is that the Civil Rights Act of 1866, from which § 1982 emanates, was designed to remove only legal disabilities in the sale or rental of property. See 392 U.S. at 452-54 (Harlan, J., dissenting).

[39] Jones, 392 U.S. at 455 (Harlan, J., dissenting) (emphasis added).

§ 1982's provisions to reach "modern manifestations of racial discrimination,"[40] and thus to effectuate the clear purposes of the Amendment under which it was promulgated. To have done otherwise would have deprived the statute "of all functional utility in today's society. Unless a statute's language and legislative history plainly require it, [however, it] . . . should not be construed into practical impotence."[41] The majority approach in Jones reflects the fundamental and historic understanding of this Court as expressed by Chief Justice John Marshall in McCulloch v. Maryland[42], that "[the] constitution [is] intended to endure for ages to come, and,

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[40] Buchanan, supra note 9, 12 Hous. L. Rev. at 848.

[41] Id.

[42] 17 U.S. (4 Wheat.) 316 (1819).



consequently, to be adapted to the various crises of human affairs."[43]

With respect to Jones's constitutional conclusion, it was both static and dynamic: Jones merely restates what even the majority of the Court in the Civil Rights Cases of 1883 was required to concede -- that Congress was empowered by the thirteenth amendment to enact legislation to eradicate the lingering badges and incidents of slavery, whether publicly or privately imposed. But Jones also represents an approval of broad Congressional definitions of the badges and incidents of slavery.[44]

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[43] Id. at 415.

[44] Under Jones the authority of Congress to define badges and incidents of slavery is not boundless. Congress is constrained to rationally link its definition to the concept of slavery. In Jones, the Court recognized the historical link to slavery in a long chain of racial

This Court must be guided in the instant case by the Jones majority's interpretation of Congressional power which is consistent with both a serious commitment to equality and with this Court's repeated acknowledgment that America remains "a Nation confronting a legacy of slavery and racial discrimination," seeking to overcome "a lengthy and tragic history" of societal, racial discrimination arising out of slavery.[45]

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discrimination in the sale and rental of property: "Just as the Black Codes, enacted after the Civil War to restrict the free exercise of [the right to acquire property], were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes." 392 U.S. at 441-42.

[45] Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 294, 303 (1978) (Opinion of Powell, J.). See also Williams v. City of New Orleans, 729 F.2d 1554, 1570-80 (5th Cir. 1984) (Wisdom, J., concurring in part, dissenting in part)



## II. Runyon v. McCrary was properly decided and a decision by this Court to overrule Runyon would retard the development of this nation's struggling commitment towards a just and equal society.

### A. Runyon is consistent with the constitutional mandate of the thirteenth amendment as construed in Jones

Just a little over a decade ago, this Court, in a decisive 7-2 opinion, held that 42 U.S.C. § 1981 prohibits private discrimination in the making and enforcement of contracts. The legislative history of that Act, as powerfully and more

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(chronicling the "effects of generations of past discrimination against blacks as a group" and the relationship of those effects to thirteenth amendment).

In addition, this Court's affirmative action decisions attest to the lingering effects in contemporary society of concepts of racial inferiority born and bred of slavery. See, e.g., Fullilove v. Klutznick, 448 U.S. 448, 463 (1980) (noting "ongoing efforts directed toward deliverance of the century-old promise of equality of economic opportunity"); United Steelworkers of America v. Weber, 443 U.S. 193, 204 (1979) (recognizing the "centuries of racial injustice").

fully presented by petitioners herein,[46] demonstrates the soundness of the Runyon decision.

In addition, the interpretation of § 1981 in Runyon "follows inexorably from the language of that statute, as construed in Jones, Tillman [v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973)], and Johnson [v. Railway Express Agency, Inc., 421 U.S. 454 (1975)]."[47] That Runyon was

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[46] See generally Brief of Petitioner on Rearguument.

[47] In Sullivan v. Little Hunting Park, 396 U.S. 229 (1969), this Court extended the reasoning of Jones to sustain a claim of racial discrimination under § 1982 for the refusal of a nonstock corporation organized to provide various amenities to the Hunting Park community to recognize a lease assignment to a Black person.

Subsequently, in Tillman, the Court essentially reaffirmed Sullivan and rejected the argument that Wheaton-Haven was a "private club" and thus immune from suit under §§ 1981, 1982, and 2000a. In a note, the Court suggested that § 18 of the 1870 Enforcement Act preserved the thirteenth amendment foundation of § 1981



properly decided is evidenced by the strength of Jones, the clarity of the intent of Congress in proposing and adopting the thirteenth amendment, and the legislative history of the Civil Rights Act of 1866.[48]

The dissent in Runyon, much like that in Jones, merely offers a competing interpretation of the congressional debates surrounding passage of Reconstruction legislation. To the extent that such interpretations are credible, they must be read in the context of the political,

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after the statute was reenacted following the adoption of the fourteenth amendment. Id. at .

In Johnson v. Railway Express Agency, the Court joined in the settled conviction among the Federal Courts of Appeal "that § 1981 affords a federal remedy against discrimination in private employment on the basis of race." 421 U.S. at 460.

[48] See generally Brief of Petitioner on Rearguument.

social and economic disarray that generally characterized the period. Notwithstanding any resultant procedural infirmities or ambiguities in the passage of various legislation, the substantive intent of Congress was clear --- to become a more perfect union, the institution of slavery had to be eliminated, root and branch. Particularly under such circumstances, neither the constitutionality nor the purpose of legislative action taken by Congress should "depend [entirely] on recitals of the power under which it undertakes to exercise."[49] A belated shift in emphasis on the various pronouncements in Congress will unnecessarily strip away "an important part

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49 Woods v. Miller Co., 333 U.S. 138, 144 (1948).



of the fabric of our law."[50] This Court must not pervert the clear substantive intent of the Reconstruction Congress by minimizing the magnitude and comprehensiveness of the evil it sought to exorcise from this nation, and which persists in society today.

**B. RECONSIDERATION OF Runyon SIGNALS A RETREAT FROM THE FUNDAMENTAL PROTECTIONS AGAINST INVIDIOUS RACIAL DISCRIMINATION AND A BURIAL OF THE MARTIME AMENDMENTS.**

**1. Section 1981 is essential in providing necessary remedies for eliminating the remaining badges and indicia of slavery banned by the Thirteenth Amendment.**

Overruling Runyon and thereby burying § 1981 would be simply disasterous, particularly for Black Americans who were specifically intended to benefit from the statute. Despite the gains achieved during the modern civil rights era, Black

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50 Runyon, 427 U.S. at 190 (Stevens, J., concurring).

Americans have never fully recovered from the ordeal of slavery. The nexus between slavery and contemporary racial discrimination extends beyond tangible injuries and cannot be denied:

> Slavery brutalized human dignity. In modern America, acts motivated by arbitrary prejudice continue to inflict the wounds that were institutionalized under slavery. When arbitrary prejudice blocks a person's opportunity to discharge a function, human dignity suffers deeply and in a measure that escapes precise calculation. This human hurt was one of the tragic products of slavery; this same hurt remains a tragic product of arbitrary prejudice in today's society.[51]

Since the revitalization of the concept of badges and indicia of slavery less than twenty years ago in Jones, courts have continued to recognize that a deprivation based solely on the color of a person's

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51 Buchanan, supra note 9, at 1073. Accord F. Douglass, Life and Times of Frederick Douglass 150 (1962).



skin causes a severe injury compensable by an award of damages.[52]

In the context of employment, § 1981 offers a critically important remedy to victims of racial discrimination.[53] The right of the newly emancipated slaves to obtain gainful employment and to be secure in the workplace were central ingredients of the freedom guaranteed by the thirteenth

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52 See generally Comment, Developments in the Law -- Section 1981, 15 Harv. C.R.-C.L. L. Rev. 29, 223 - 24 & n.29 (1980); E. B. Larson, The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment, 7 Harv. C.R.-C.L. L. Rev. 56, 99 (1972).

53 In Johnson v. Railway Express Agency, 421 U.S. 454 (1975), this Court concluded that "the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends are separate, distinct, and independent." Id. at 461. See also Brief Amicus Curiae of the American Civil Liberties Union Foundation and the North Carolina Civil Liberties Legal Foundation In Support of Petitioner at 14-20, Patterson v. McClean Credit Union, No. 87-107 (U.S. October Term, 1987).

amendment and protected by the Civil Rights Act of 1866.[54]

> [F]reedom meant more than simply receiving wages. Freedmen wished to take control of the conditions under which they labored, free themselves from subordination to white authority, and carve out the greatest measure of economic

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[54] The Reconstruction Congress heard testimony that indicated that "the Black Codes told only part of the story, and a very small part at that. At the same time that the South was removing the Negro's legal disabilities from its statute books, it was covertly attempting to reintroduce a new, privately enforced slave system." Kohl, The Civil Rights Act of 1866, Its Hour Come Round At Last: Jones v. Alfred Mayer Co., 55 Va. L. Rev. 272, 279-80 (1969). See also Goodman v. Lukens Steel Co., 482 U.S. ___, 107 S. Ct. 2617, 2627-28 ("the legislature's central concerns in 1866 revolved around actions taken by the States and by private parties which consigned black Americans to lives of perpetual economic subservience to their former masters") (second emphasis supplied); Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 518 F. Supp. 993, 1008 (S.D. Tx. 1981) ("Section 1981 protects a panoply of individual rights the primary one being the right to contract to earn a living.").



autonomy.[55]

The historical interference with the right of Black Americans to work for wages is a long and well documented one. The continuing impact of such interference cannot be understated. A recent report by the Commission on Minority Participation in Education and American Life, "One-Third of a Nation," concluded that "America is moving backward -- not forward -- in its efforts to achieve the full participation of minority citizens in the life and prosperity of the nation." Noting steady and widening gaps between the minority and majority populations in "education, employment, income, health, and other basic measures of individual and social well-being," the report predicts grave consequences with respect to the social

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[55] E. Foner, supra note 2, at 102-03.

harmony and security of this nation.[56] Thus, now, as during the post-Reconstruction period as recognized by noted historian Eric Foner:

> the fulfillment of blacks' "noneconomic" aspirations, from family autonomy to the creation of schools and churches, all depend[ ] in considerable measure on success in winning control of their working lives and gaining access to . . . economic resources . . . .[57]

Remedies for interferences with the right to contract for employment must be as varied and comprehensive as the injuries. Section 1981 entitles a successful claimant to both equitable and legal relief, including compensatory and, under certain

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[56] Cf. Kerner Commission Report: 2 Decades of Decline Chronicled by Kerner Follow-Up Report, N.Y. Times, March 1, 1988, National News page (noting a 'persistent, large and growing American economic underclass').

[57] E. Foner, supra note 2, at 110.



circumstances, punitive damages.[58] Both as a compensatory and deterrent measure in the struggle for racial equality, § 1981 is an indispensible remedy and is necessary if the "badges and indicia of slavery" are ever to be eradicated from this society.

> 2. Overruling Runyon would destroy the recent expansion of the protections of § 1981 to other oppressed groups in American society.

Just last term, in Saint Francis College v. Al-Khazraji[59], this Court unanimously broadened the scope of § 1981 by extending its protections against racial discrimination to persons of Arabian ancestry.[60] There, after announcing the

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[58] See Johnson, 421 U.S. at 453.

[59] 481 U.S. ___ , 107 S. Ct. 2022 (1987).

[60] In a related case, the Court similarly held that 42 U.S.C. § 1982 encompasses a claim of racial discrimation by Jews. Shaare Tefila Congregation v. Cobb, 481 U.S.___ , 107 S. Ct. 2019 (1987).

applicability of the fundamental propositions set forth in Runyon, the Court noted that "[t]here is no disagreement among the parties on these propositions," 107 S. Ct. at 2026, and proceeded to address the issue presented. It is indeed ironic that after such explicit acknowledgment of the vitality of the Runyon holding in Al-Khazraji, and with similar acquiescence, if not consent, to the Runyon holding by the parties in Patterson, that some members of the Court find its application troublesome. The clear effect of a decision now to undercut the very basis of not only the Court's decisions last term, but the many judicial decisions which squarely rely upon Runyon, would be to wind the clock backward, permitting widespread discrimination to fester.



Only thirty-four years ago, this Court rendered its most significant decision in the area of race relations. Brown v. Board of Educ.,[61] marked the beginning of a national committment to genuinely address the issue of racism, its origins and effects. By rejecting the notion, first endorsed by this Court in Plessy v. Ferguson[62], that the doctrine of 'separate but equal' was a desirable and constitutional model of conduct, Brown began a revolution in American racial thinking. Post-Brown years witnessed the intense, and oft-times turbulent, struggle of American citizens -- Black and white -- to overcome historically entrenched - stereotypical, racial attitudes that

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[61] 347 U.S. 483 (1954).

[62] 163 U.S.537 (1896). See also supra note 31 (discussing the implications of Plessy).

continue to plague us today.[63] During those years, the concerted efforts of the national government -- legislative, executive, and judicial -- aided significantly to the transitional efforts of the era.

As evidenced by the Court's decisions in Shaare Teflia and Al-Khazraji, rather than evolving into a more tolerant society, we have become a nation rife with prejudices. The proliferation of new hate groups -- e.g., the Skinheads, the Dot-Bashers -- and the cancerous persistence of the old -- e.g., the Ku Klux Klan, further signifies a nation in perpetual turmoil.[64]

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[63] For a detailed account of the post-Brown struggles, see, J. Williams, Eyes On The Prize: America's Civil Rights Years, 1954-1965 (1987).

[64] Non-violent acts of racism, such as those inflicted upon petitioner, Brenda Patterson, are no less indicative of a nation in which racism is unwilling to die. Indeed, they are probably more common of the discriminations that reinforce the need for a strong, national commitment towards their elimination.



Section 1981 is a key legislative mandate designed to deter and inevitably eliminate racial discord.

Runyon v. McCrary represents sage social policy and sound legal judgment. Its underlying propositions must not be disturbed. "[P]rotection against racial abuse by the state is significantly diminished if the same results can be accomplished by private parties."[65] Thus, if the intent of the Reconstruction Congress in adopting the Wartime Amendments and in enacting legislation thereto is not to be reduced to a 'mere paper

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[65] Kennedy, Race and the Fourteenth Amendment : The Power of Interpretational Choice, in A Less Than Perfect Union 285 (J. Lobel ed. 1988).

guarantee,'[66] remedies against private discriminatory conduct must be preserved.

## CONCLUSION

Just as the Constitution by its silence swept the ugly existence of African slavery under the rug, a decision to overrule Runyon may be similarly perceived as an inability to confront reality coupled with an unwillingness to care. For those private individuals drunk with racial hatred, such a decision will constitute a green light to execute comfortably their prejudices. For those historical and contemporary targets of private discrimination, -- Blacks, Latinos, Jews, Asians, Arabs, Native Americans, women, homosexuals -- such a decision may well create a blow so great that their faith and

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66 Jones, 392 U.S. at 443 (citations omitted).



respect in the integrity of the judiciary will be forever lost.

Accordingly, and for the reasons set forth above, and those expressed in petitioner Patterson's brief, this Court should not overrule Runyon; rather, it should reaffirm § 1981's reach to private discrimination as set forth in Runyon and affirmatively determine that it encompasses a claim of racially motivated harassment in the workplace as destructive of the right to make and enforce contracts free from prohibited discrimination.

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Counsel would like to express their appreciation for the assistance provided by Paul Heinzel and H. Susan Nadler in the preparation of this brief.

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The ASSOCIATION OF LATINO ATTORNEYS (ALA) is an association of activist lawyers, law students, and other legal workers committed to the political, social and economic empowerment of the Latino community in the United States. ALA recognizes that Latinos have and continue to suffer discrimination in this society. Therefore, ALA's work focuses on the protection of human and civil rights of all Latinos under the law. ALA believes that a reconsideration of the applicability of 42 U.S.C. Section 1981 to private entities threatens established precedent which has advanced the cause for civil rights. ALA, as amici to this brief, seeks to urge the Supreme Court to maintain the precedent set regarding Section 1981 as integral to the protection of victims of discrimination.

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The ASSOCIATION FOR NEIGHBORHOOD AND HOUSING DEVELOPMENT (ANHD) is a federation of over forty non-profit housing groups whose mission is to advocate and seek to implement policies and programs that create and preserve permanent affordable economical and racially integrated housing for low and moderate income New Yorkers. Overruling Runyon v. McCrary would deprive ANHD's member groups of their ability to achieve their organizational mission.

• • •

BLACKS IN GOVERNMENT - REGION II (BIG) is a non-profit organization concerned with professional and cultural development of Blacks in government employment. The membership includes both currently employed and retired persons from Federal, State and Local governments. BIG-Region II is the coordinating body for local chapters of BIG



in New York, New Jersey, Puerto Rico and U.S. Virgin Islands. The Region II Council of BIG coordinates the activities of local chapters and serves as a liaison between local chapters and the National Office.

Blacks in Government has been in the vanguard of lobbying efforts for civil rights statutes, and takes the position that the reversal of Runyon v. McCrary, 427 U.S. 160 (1976) would be a major setback for the civil rights gains made since the reconstruction era.

Therefore, we urge the Court to reaffirm the holding of Runyon v. McCrary, 427 U.S. 160 (1976).

• • •

The BOSTON COMMITTEE FOR A JUST SUPREME COURT is a coalition of diverse organizations that share a common concern that the present Supreme Court is eroding

our fundamental freedoms, especially through undermining our Constitutional protections against racial and sexual discrimination and reproductive freedom. We believe that overruling Runyon v. McCrary will set a dangerous precedent where the Supreme Court will reach out gratuitously and overturn hard fought civil rights gains.

• • •

The CAPITAL DISTRICT COALITION AGAINST APARTHEID AND RACISM (Albany, New York) was formed in 1981 to organize opposition to a planned visit to Albany, New York of a rugby team from the Republic of South Africa. The COALITION consists of representatives of more than a dozen organizations, including local affiliates of the NAACP, the National Lawyers Guild, Black Social Workers, YWCA and several



local organizations. The COALITION is an activist grass roots organization dedicated to ending United States complicity with the apartheid government of South Africa, supporting the liberation movement in South Africa and Namibia, and eradicating racism in the United States. Towards these ends, the COALITION has presented educational forums, has lobbied in the New York State Legislature and the United States Congress and has organized demonstrations and petition campaigns. Since May, 1986 the COALITION has also participated as a member organization of the City of Albany's Community/Police Relations Board.

The COALITION believes that progress towards eradicating racism depends, in part, on the existence of a clear mandate from the United States Supreme Court that civil rights of minorities are protected

and that victims of racism have effective real avenues of redress. The COALITION is concerned that if the Court's decision in Runyon v. McCrary, 427 U.S. 160 (1976), is overturned, it will create substantial obstacles for victims of discrimination and will provide an impetus to those who would like to see a return to the blatant and pervasive racism of the period before this Court's unanimous and historic decision in Brown v. Board of Education, 347 U.S. 483 (1954), which signaled the end of the legal system's complicity in racial discrimination. We urge this Court to re-affirm the holding of Runyon v. McCrary, 427 U.S. 160 (1976).

• • •

The CENTER FOR CONSTITUTIONAL RIGHTS (CCR) was born of the civil rights movement and the struggles of Black people in the



United States for true equality. CCR attorneys have been active in cases involving voting rights, jury composition, community control of schools, fair housing and employment discrimination. Through litigation and public education, CCR has worked to protect and make meaningful the constitutional and statutory rights of women, Blacks, Puerto Ricans, Native Americans and Chicanos.

• • •

The CENTER FOR LAW AND SOCIAL JUSTICE at MEDGAR EVERS COLLEGE (CLSJ) is a research and advocacy institution, created in 1985 by a special appropriation of the New York State Legislature, to meet an existing need within the City of New York for a civil rights, social justice and legally oriented institution. The CLSJ litigation and projects deal with matters

of pressing civil and human rights nature such as employment, education, voting rights, and housing. Discrimination in these areas has historically impacted adversely on the communities we serve which primarily consist of people of African descent. CLSJ joins with amici in urging this Court to reaffirm the reach of Section 1981 to private discrimination and affirmatively determine that it encompasses a claim of racially motivated harassment in the workplace. The continued effectiveness of our efforts to help reach the goal of a society free of race discrimination requires such a ruling by this Court.

• • •

CLERGY AND LAITY CONCERNED (CALC) is a nationwide multi-racial network of people of faith and conscience from all walks of life. CALC represents fifty chapters with



35,000 members in the United States and West Germany. CALC exists to help build a movement of justice and peace which will include people of different races, religions, ages, ethnic and economic backgrounds. Through education, political involvement, and the power of truth and love in action, CALC works for fundamental social change. CALC brings moral, ethical and religious values to bear on issues of human rights, racial and gender justice, militarism and economic justice at home and abroad. CALC challenges its members as well as religious communities and others to be actively engaged in doing justice and making peace as taught by all the world's religious traditions. Founded in 1965, CALC is an organization committed to building "the beloved community" called for by one of CALC's first co-chairs , the

Reverend Dr. Martin Luther King, Jr. This community is inspired by a liberating spirituality grounded in the sacredness, harmony and balance of all creation.

* * *

The CLEVELAND-MARSHALL CHAPTER OF THE NATIONAL BAR ASSOCIATION, LAW STUDENT DIVISION (NBA,LSD) is an organization that advances the Science of Jurisprudence, upholds the honor of the legal profession, promotes social intercourse among the members of the bar and Protect the Civil and Political Rights of All Citizens.

The minority law students at Cleveland State University chose to take advantage of the networking and mentorship possibilities and founded the Cleveland-Marshall Chapter of the NBA,LSD.

The NBA,LSD focuses upon the concerns of non-white law students in an effort to



promote social intercourse among members of the bar and Protect the Civil and Political Rights of All Citizens. The organization is dedicated to effectuating change by eradicating racism and discriminatory policies and attitudes and sensitizing law schools and the legal profession to the needs of the Black Community.

Our parent organization, The National Bar Association, was founded in 1925 and now represents a network of over 10,000 lawyers, judges, law faculty, administrators and students. In 1987, the NBA expressed its commitment to reactivate its law student division through the passing of resolutions for that purpose.

* * *

The COALITION OF BLACK TRADE UNIONISTS - PITTSBURGH CHAPTER (CBTU) is a local component of a national trade union

organization which was established in 1972.

As an organization of Black trade unionists, we have been concerned and involved in societal issues which affect and concern Black people in particular and the American Labor Movement in general. Of utmost concern, we have been and continue to be involved in activities designed to eliminate racial discrimination and harassment in the workplace and in the community at large.

For example, we have fought against racial exclusion and discrimination of minorities and women from certain industries in our community and country, e.g. construction. We have coalesced with other concerned organizations to protest against racially-motivated violence against minorities. We have provided support to our members who have sought to use existing



laws to provide adequate remedies for acts of racial discrimination and harassment committed by private parties and others.

Our belief, interest and concern as demonstrated by our history is that all heretofore enacted federal civil rights laws be vigorously enforced and broadly applied to prohibit public as well as private acts of racial discrimination and harassment. For the foregoing reasons, we join herein.

* * *

The COALITION FOR COMMUNITY EMPOWERMENT ("CCE") consists of public elected officials and private citizens and is chaired by Congressmen Major Owens. CCE was formed to mobilize and maximize participation of black and hispanic communities in the electorial process. CCE believes that the denial to blacks and

hispanics of the right to vote is inexplicably linked with the perpetuation of private discriminatory conduct throughout our society. Therefore, CCE joins with amici in support of its position that private discrimination is prohibited by the thirteenth amendment and Section 1981. We urge this Court to reaffirm this principle, and in doing so, the principle that race discrimination has no place in this society.

• • •

The COMMUNITY ACTION FOR LEGAL SERVICES/LEGAL SUPPORT UNIT (CALS/LSU) is a legal services office that provides support to casehandlers in neighborhood legal services offices throughout New York City. The CALS/LSU has coordinators in substantive areas of legal practice that affect poor people's lives and provides



training, advice, coordination and co-counselling assistance to attorneys and paralegals in local legal services offices. Along with local offices, the CALS-LSU is involved in a variety of appeals and class actions involving issues of substantial impact on the lives of the low-income client community. The low-income client population in New York City is composed overwhelmingly of members of racial minority groups. The CALS/LSU is interested in the outcome of the Patterson case because among the legal rights that the CALS-LSU defends on behalf of its client community is the right to be free from public and private racial discrimination, and because access to federal courts to pursue discrimination claims is critical for our clients.

• • •

The COMMITTEE OF INTERNS AND RESIDENTS (CIR) is a labor organization within the meaning of the laws of the United States and the states of New York and New Jersey. CIR was formed and is perpetuated for the purpose of representing house staff officers, (which includes interns, residents and fellows) in hospitals and health care facilities, with respect to compensation, benefits, hours of work, working conditions, education and the quality of health care services, delivery and programs.

CIR has signed collective bargaining agreements governing the interests of about 5000 house staff officers employed by voluntary and public hospitals in New York, New Jersey and Washington, D.C. All of these contracts contain clauses prohibiting discrimination by the employers. Typical



is the provision in the current contract between CIR and Catholic Medical Center of Brooklyn: "The CMC shall not discriminate against any House Staff Officer on account of race, color, creed, national origin, handicap, place of medical education, sex or age."

With ample justification both parties to the agreements perceived -- irrespective of whether the hospital was public or private -- that the asserted national policy, rooted in the Constitution of the United States, was to remove invidious discrimination from the life of this country. This perception had a major impact on the securing of these non-discrimination clauses.

CIR has a specific interest in the prevention of invidious discrimination against those it represents and against

other house staff officers without any contract protection whatsoever, as well as a general interest as the representatives of human beings, in the existence of a strong national policy against discrimination. A return to the view that Section 1981 only bars invidiously discriminatory state action would be not only destabilizing, but also damaging to the protection of minorities and an unwarranted divergence from the road toward equality along which the members of CIR and countless other citizens thought we, as a nation, were proceeding.

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CONGRESSMAN MAJOR OWENS represents the Twelfth Congressional District in Brooklyn, New York, which encompasses portions of Crown Heights, Brownsville, and the Bedford-Stuyvesant section of Brooklyn.



The majority of his constituents are black and hispanic and benefit directly from the protections afforded by the thirteenth amendment and 42 USC 1981. Congressman Owens joins amici in urging this Court to continue to extend coverage of Section 1981 to proscribe acts of private discrimination.

• • •

FRANKLIN PIERCE LAW CENTER CIVIL PRACTICE CLINIC is a clinical program at Franklin Pierce Law Center representing low income clients, primarily women and their children, in the community. We abhor racial and gender discrimination. Poor people -- our clients -- face enough hurdles and obstacles without the added burden of discrimination.

• • •

The FUND FOR OPEN INFORMATION AND

ACCOUNTABILITY, INC. (FOIA, Inc.) is an educational and activist organization dedicated to fighting for an open and accountable government. Founded in 1977 to correct the public record and expose the injustices suffered by Julius and Ethel Rosenberg who were executed in 1953 during a wave of anti-communist hysteria, FOIA, Inc. has since devoted its activities to exposing and interpreting a range of governmental initiatives.

Most recently, in conjunction with the Center for Constitutional Rights, FOIA, Inc. obtained enough documentation (through the Freedom of Information Act) from the Federal Bureau of Investigation to convincingly inform the public that the days of witchhunts are not over. These documents revealed the FBI's systematic and thorough program of intimidation,



harassment and surveillance of individuals who dissent from U.S. government policy in Central America. The issue is one of civil rights and constitutional protection. It appears that political activists, when attempting to reverse the government's Central American foreign policy, run the risk of losing their rights to constitutional protection.

FOIA,Inc. is firmly committed to affirmative action and to the 1976 Supreme Court decision in Runyon v. McCrary. While some defenders of the Constitution prefer to interpret it as the protector of elite, white, male slaveholders' interests that it once was, we understand that the improvements made to it, particularly in the Thirteenth and Fourteenth Amendments, were necessary if our society were ever to live up to the ideals expressed when this

Union was formed.

If the decision of Runyon v. McCrary is successfully challenged, just as if the intimidation of political activists continues, we surely run the risk of restoring the Constitution to its original document, devoid of the Bill of Rights.

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GAY AND LESBIAN ADVOCATES AND DEFENDERS (GLAD), incorporated in Massachusetts as Park Square Advocates, Inc., a non-profit, tax-exempt corporation, was founded in 1978 to litigate and educate on behalf of lesbian and gay civil rights. GLAD's commitment to broad based civil rights protections and to the federal government's important role in eradicating bigotry and combatting discrimination cause us to be deeply concerned about the impact this case will have on civil rights in the



United States.

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The GUARDIANS POLICE ASSOCIATION is an organization of black police and law enforcement officers in Michigan dedicated to combatting racial discrimination. In 1980, the Guardians, along with the Detroit Branch of the NAACP and several individuals sued the union which represents the Detroit police officers alleging racial discrimination by the union in the negotiations which resulted in the lay offs of approximately 800 black officers. The District Court initially ruled that the union's conduct violated the duty of fair representation. Although the Sixth Circuit reversed on the duty of fair representation issue, the case was remanded for findings under 42 USC 1981. We, therefore, have a very direct interest in the outcome of the

claim since according to the Sixth Circuit the only avenue we have for redressing this discrimination is under 42 USC 1981.

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The INSTITUTE OF JEWISH LAW OF TOURO COLLEGE, JACOB D. FUCHSBERG LAW CENTER concentrates on research and scholarship in the field of Jewish legal studies. The Institute is concerned that the gains recently won by victims of anti-semitism and other forms of ethnic, racial and ancestral discrimination will be largely lost should this court overrule Runyon v. McCrary and restrict the Civil Rights Act of 1866 to state imposed discrimination.

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The JEWISH COUNCIL ON URBAN AFFAIRS (JCUA) is a non-profit organization dedicated to addressing the problems of racism, anti-semitism and poverty in



Chicago, Illinois. Founded in 1964, JCUA provides staff, volunteers and other resources to organizations based in minority communities to help those groups identify and confront issues, and achieve self-empowerment. The JCUA believes that the federal courts must continue to guarantee the full and equal rights of all citizens. Section 1981 should continue to protect minorities from discrimination by private parties. JCUA is concerned that without such federal protection, the progress of minority communities will be significantly hindered.

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LA RAZA LAWYERS' ASSOCIATION OF SAN FRANCISCO is an unincorporated professional organization made up of latino lawyers practicing in the city and county of San Francisco, California.

The LA RAZA LAWYERS' ASSOCIATION OF SAN FRANCISCO, at its general membership meeting held on June 16, 1988 passed a motion supporting the listing of the association as an amicus on the matter of Patterson v. McClean Credit Union. The membership unanimously opposed any reconsideration of civil rights precedents which have provided ethnic and racial minorities in the United States, with the legal remedies essential to building a more integrated and just society.

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LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. is a New York non-profit civil rights organization dedicated specifically to test case litigation affecting the rights of lesbians and gay men. Founded in 1972, Lambda is the country's oldest and largest national legal organization devoted



to these concerns. Lambda has appeared as counsel or amicus curiae in numerous cases in both state and federal courts on behalf of lesbians and gay men who have suffered discrimination and civil rights violations because of their sexual orientation. As an organization which represents a community with very few legal protections or rights, Lambda is acutely aware of the harm to all people represented by any threat to undermine or retrench on civil rights and legal protections against the evils of discrimination. As an organization which represents a diverse community, consisting of all people of ethnic and racial groups, age, gender and backgrounds, Lambda takes a particular interest in a threat to the civil rights of any faction of our community.

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METRO-CHICAGO CLERGY AND LAITY CONCERNED (CALC) is the Chicago chapter of a nationwide, multi-racial network of people of faith and conscience from all walks of life. CALC exists to help build a movement of justice and peace which will include people of different races, religions, ages, ethnic and economic backgrounds. CALC brings moral, ethical and religious values to bear on issues of human rights, racial and gender justice, militarism, and economic justice at home and abroad.

CALC's participation as amicus curiae to a brief which seeks to preserve important civil rights remedies is consistent with CALC's social justice ministry.

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The MID-WEST COMMUNITY COUNCIL --



CHICAGO, ILLINOIS (MCC) is a forty-two year-old community service organization based on the west side of Chicago, Illinois. It is the oldest community organization of its kind in Chicago. It provides a range of social services to approximately 100,000 Westside residents, 98% of whom are black. Its advisory council is made up of representatives of resident block clubs and other community leaders. MCC's aim is to make sure that residents have a voice in all decisions that effect them. MCC has an interest in seeing that 42 USC 1981 remains a devise by which its members and the residents which it serves can continue to combat private acts of racial discrimination and violence.

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The MOUND CITY BAR ASSOCIATION (MCBA) is an organization comprised primarily of

black attorneys which includes as its purposes to improve the administration of justice, to uphold the honor of the legal profession, to promote the professional advancement of black attorneys, and to provide service to the community. Since its establishment in 1922, members of the MCBA have been actively involved in landmark civil rights litigation, including those cases which promote the principles of affirmative action. We are deeply concerned about the Supreme Court's initiative to reconsider its decision of twelve years ago in Runyon v. McCrary. There remain considerable injustices in the employment arena with blacks and other minorities still struggling for equal application of employment practices. Therefore, we urge this Court to reaffirm the holding in Runyon v. McCrary which



prohibits discrimination within private educational institutions and to apply 42 USC 1981 to the private sector.

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The MOUNTAIN STATE BAR ASSOCIATION, INC., is the only minority Bar association in the State of West Virginia.

Although originally founded in the earlier part of the 20th century, its current vitality dates from 1974.

The Association's work involves itself in the daily struggle to promote and maintain equal opportunity, in all facets of life, for all of our State's citizens.

Aside from these distinctly legal undertakings, the Association is greatly involved in raising funds to provide Fellowships for minority and needy students in the State of West Virginia. Since this component was added to our work in 1974,

nearly one hundred young women and men have been assisted in their legal education, as well as their legal careers, as a result of this program.

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The NATION INSTITUTE is a non-profit tax-exempt organization that has a particular interest in the areas of First Amendment, social justice, and peace and national security. To further these interests, we have taken a special role in civil rights and civil liberties. One of the projects of the Nation Institute is to carry on the work of the Committee for Public Justice, founded in the early 1970's, which maintains a "justice watch" including equal access to the judicial process.

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The NATIONAL CONFERENCE OF BLACK



LAWYERS (NCBL) is an activist legal organization of Black lawyers, law professors, judges, law students and legal workers dedicated to serving as the legal arm of the Black community. Since its inception in 1968, NCBL has been actively involved in the continuing struggle for equal employment opportunity. Over the past twenty years, NCBL has led the struggle for the full implementation of the principles of affirmative action that have been affirmed by the Congress and the Courts. We are deeply concerned about the prospect that the Court will limit the access of civil rights petitioners to redress grievances of racial discrimination by private entities.

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The NATIONAL LAWYERS GUILD - NATIONAL EXECUTIVE COMMITTEE was founded in 1937 as

a multi-racial and progressive alternative to the racially restrictive and conservative American Bar Association. Its commitment to civil rights dates back to efforts to eliminate the poll tax and white primaries. In 1962, the Guild dedicated its full resources to the legal support of the civil rights movement. In support of affirmative action, the Guild filed briefs as amicus curiae throughout the course of the Bakke litigation and in 1977, joined with the NCBL to co-sponsor a Bakke amici roundtable attended by forty organizations. The rehearing of Runyon v. McCrary strikes at the foundation of these on-going efforts to end racism of public and private institutions.

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The NATIONAL LAWYERS GUILD - SOUTHERN ARIZONA CHAPTER is a local



affiliate of the National Lawyers Guild. Such local affiliates comprise the nationwide network of lawyers, law students, and legal workers who make up this organization. The SOUTHERN ARIZONA CHAPTER was founded on the same principles as the national organization. Among these principles are a commitment to social, economic, and political justice. Included here is a firm belief in racial equality.

In light of these principles, we are opposed to the possibility that the Supreme Court might overrule its decision in the case of Runyon v. McCrary. Past Supreme Court decisions reflect a recognition that the Thirteenth Amendment to the Constitution empowers Congress to eradicate all "historical badges and incidents" of slavery. Such "badges and incidents" occur both in the public and private sector. The

Court must not abandon these past advances. Despite recent gains, the position of racial minorities in our society is still tenuous at best. Without constant diligence their position will surely worsen. As such the SOUTHERN ARIZONA CHAPTER OF THE NATIONAL LAWYERS GUILD joins in the amicus brief. We further urge the Court to let stand their decision in Runyon v. McCrary, and to reaffirm that racism in any form will not be tolerated.

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The NATIONAL LAWYERS GUILD-UNIVERSITY OF MIAMI CHAPTER is an organization of progressive law students dedicated to the principles of freedom, equality and opportunity for all. As an organization we take a zero tolerance approach to discrimination wherever it occurs.

It is our strong belief that



affirmative action programs are the only effective tools in the effort to integrate the workplace. Discrimination can be and often is more overt in the private sector. If we are to continue the path of total integration in both public and private sectors, we must adopt the instrument which affords the most effective results and gives us concrete indicators of good faith, not just promises.

The reconsideration of Runyon v. McCrary could result in the institutionalization of private discrimination and the creation of a new apartheid via the public/private dichotomy.

The people of this country have given our legislators and life-tenured judiciary the mandate to create a society that lives up to the egalitarian ideals embodied in our Constitution. There can be no retreat

from this ideal.

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The NATIONAL RAINBOW COALITION, INC. is a national membership organization founded to further the progressive movement in this country. Its membership includes persons of every race, color and creed. One of the essential founding principles of the organization is that all members of American society must have equal rights and opportunities if this society is to begin to live up to the democratic and moral principles underlying its creation and progress. Over the past two centuries, the work of the National Rainbow Coalition has been geared toward expanding opportunity to all the people of the country and consequently fighting to eliminate all discriminatory barriers which still exist. It is in this context that the National



Rainbow Coalition is deeply concerned that this Court not overrule its interpretation of 42 USC 1981 adopted in Runyon v. McCrary which held that Section 1981 reaches out to private conduct. The overruling of Runyon would constitute a disastrous step backwards undermining the constitutional foundations of equality of opportunity fought for by so many of our people over the past years.

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PLAINTIFF EMPLOYMENT LAWYERS' ASSOCIATION (PELA) is a non-profit tax exempt organization consisting of over six-hundred thirty lawyers in all fifty states and the District of Columbia. Its members specialize in representing individual employees concerning employment and labor matters. Many of PELA members' clients are employees or ex-employees with claims of

racial discrimination against private employers under 42 USC 1981. PELA members have found Section 1981 to be an effective means of securing full relief for the clients and of deterring future civil rights violations. Amicus is deeply concerned about the practical and symbolic effects of a decision of this Court overruling Runyon v. McCrary. On the practical level, many private employers will lessen their safeguards against and/or will be tempted to engage in racial discrimination, if they need not fear liability for compensatory and punitive damages under Section 1981. On a symbolic level, amicus is concerned that such a decision will be viewed as a major retreat from the national goals of equal opportunity and fair treatment for all employees.



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The SOUTHERN CALIFORNIA CHINESE LAWYERS ASSOCIATION (SCCLA) serves as a mutual support network for the Chinese-American legal community in Southern California and provides a forum for the unified expression of views on issues which effect and concern the Chinese-American and broader Asian-Pacific American communities. With a membership of more than two-hundred legal professionals, SCCLA has developed extensive ties to the community, providing it with not only much needed legal services and advocacy skills but also a representative voice on civil rights and other significant public policy issues.

The Supreme Court decision in Patterson v. McClean Credit Union to reconsider the holding in Runyon v. McCrary is a source of grave concern to SCCLA, as

well as other members of the Asian-Pacific American legal community and the Asian-Pacific American community at large. What was previously well-established law that 42 USC 1981 prohibits racial discrimination in the making and enforcement of private contracts is suddenly in danger of being undermined and discredited. As Americans of Asian ancestry who have experienced the insidious effects of both public and private discrimination in this country, we join with other concerned individuals and organizations as amici to urge the Court to uphold the rule of law which was enunciated more than twelve years ago in the Runyon decision. A contrary result will send a clear message to the American people that the right to be free from racial discrimination is as feeble as the doctrine of stare decisis.



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SPATER, GITTES & TEREZIAN, HANDLEMAN & KILROY, and three sold practitioners, JOHN MARSHALL, GORDON HOBSON and JAMES MCNAMARA practice law in the state of Ohio. We have represented hundreds of victims of private race discrimination and private racially motivated violence in claims brought pursuant to 42 USC 1981, and have at present several such cases pending in state and federal courts.

We submit that it is essential to our ability to competently and adequately represent the interests of plaintiffs who have been the victims of private race discrimination and racially motivated violence, that 42 USC 1981 provide a cause of action against such private discrimination and violence. No other federal or state laws extend the rights and

protections available pursuant to 42 USC 1981.

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The STUDENT ASSOCIATION OF THE STATE UNIVERSITY OF NEW YORK, INC. (SASU) was founded in 1970 and represents the 380,000 students of the State University system. SASU represents, advocates and furthers the interests and welfare of the students of the State University of New York. SASU engages in lobbying activity in the NYS Legislature, as well as the United States Congress, on issues relevant to college students, such as voting rights, financial aid and civil rights. SASU has also actively litigated issues of student rights and has developed programs benefiting the students of the State University of New York in regard to issues of human and civil rights in society at large.



We recognize the detrimental impact on the civil rights gains of recent years that would result if this Court reversed the holding in Runyon v. McCrary, 427 U.S. 160 (1976). We urge this Court to reaffirm Runyon v. McCrary in order to assure us, as young people, a future of greater civil rights rather than a return to legally enforced discrimination and repression.

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TOWARD A MORE PERFECT UNION is a national coalition of a spectrum of progressive organizations and individuals, including legal groups, academics, and labor unions, who are interested in participating in a unified forum to express concerns over the present Constitutional crisis and develop a broad educational campaign for a progressive celebration of our constitutional legacy during the

Bicentennial period, 1987 through 1991. The coalition is committed to organizing widespread citizen involvement in recognizing and acting upon the dangers facing civil liberties today in the hope that such acknowledgment and action will strengthen and enhance our Constitution and Bill of Rights. As a coalition concerned with protecting, advancing and enhancing our Constitution and Bill of Rights, we believe that a reversal of the decision in Runyon v. McCrary would be a serious retrenchment of civil rights gains. We therefore urge the Supreme Court to reaffirm the holding in Runyon.

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UNITED AUTOMOBILE WORKERS OF AMERICA (UAW) LOCAL 259 represents 4,000 mechanics, parts and assembly workers employed by automobile dealers and plants in the tri-



state area.

Our Union, since its inception fifty years ago, has fought to protect its members against race and employment discrimination. We are, therefore, deeply concerned about the Supreme Court's reconsideration of the 1976 Runyon v. McCrary decision.

Should this decision be reversed, it would have a devastating effect on our members and their families and reverse decades of civil rights advancement.

We, therefore, join as AMICI in this brief and urge the Court to uphold the Runyon decision.

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The UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE) is a national labor organization whose essence of existence is the demonstrated commitment

towards equality and against discrimination in all of its forms, whether in the workplace or society at large, regardless of whether such discrimination is caused by government, public or private entities and individuals.

From its inception in 1936, the UE has made clear its sincere concern and commitment not only to improve the "working and living conditions" of its members (UE National Constitution), but to support those efforts and laws which seek to eliminate racial inequality in our nation. For example, UE unequivocally declared at its founding convention that it opposes "all forms of discrimination of foreign born or Negro workers." Since that time, UE has repeatedly expressed in convention resolutions its opposition to racial discrimination, has successfully included



protective language in all of its collective bargaining agreements, and has fought discrimination against its members on the shop floor,and pursued remedies through legal proceedings.

Moreover, UE has supported and participated in the Civil Rights Movement and supports the Civil Rights Act of 1866 and those laws, regulations and court interpretations which give it full and wide applicability in dealing with acts of racial discrimination and racial harassment by public bodies, government officials, private entities and individuals.

Thus, any official "review", "reconsideration" or similar initiative taken regarding the Civil Rights Act of 1866 or any other civil rights law is of deep concern and interest to the UE and its members.